

1995

Foch Parkinson and Hazel Larsen v. Jesse Riker and Deborah J. Riker : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Brian Jackson; Attorney for Defendants/Appellees.

Joseph Harlan Burns; Attorney for Plaintiffs/Appellants.

Recommended Citation

Brief of Appellant, *Parkinson v. Riker*, No. 950603 (Utah Court of Appeals, 1995).

https://digitalcommons.law.byu.edu/byu_ca1/6865

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

K F U

50

.A10

DOCKET NO. 950603 CA

IN THE UTAH COURT OF APPEALS

FOCH PARKINSON and HAZEL LARSEN)	
)	
)	
Plaintiffs and Appellees,	)	No. 950603-CA
)	
v.)	
	)	Priority 15
JESSE RIKER and DEBORAH J. RIKER,)	
)	
Defendants and Appellants.)	

BRIEF OF APPELLANTS

On Appeal From The Judgment of the
Fifth Judicial District Court
In and for Beaver County, State of Utah
Honorable J. Philip Eves

Joseph Harlan Burns (0507)
P. O. Box 692
Cedar City, Utah 84721-0692
Telephone: (801) 586-8922

Attorney for Plaintiffs/Appellants

J. Brian Jackson
P. O. Box 519
157 East Center
Cedar City, Utah 84720

Attorney for Defendants/Appellees

COURT

JOSEPH HARLAN BURNS, #0507
Attorney for Plaintiff/Appellant
P. O. Box 692
Cedar City, Utah 84721-0692
(801) 586-8922

IN THE UTAH COURT OF APPEALS

FOCH PARKINSON and HAZEL LARSEN)	
)	
)	
Plaintiffs and Appellees,	)	No. 950603-CA
)	
v.)	
	)	Priority 15
JESSE RIKER and DEBORAH J. RIKER,)	
)	
Defendants and Appellants.)	

BRIEF OF APPELLANTS

On Appeal From The Judgment of the
Fifth Judicial District Court
In and for Beaver County, State of Utah
Honorable J. Philip Eves

Joseph Harlan Burns (0507)
P. O. Box 692
Cedar City, Utah 84721-0692
Telephone: (801) 586-8922

Attorney for Plaintiffs/Appellants

J. Brian Jackson
P. O. Box 519
157 East Center
Cedar City, Utah 84720

Attorney for Defendants/Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIESii
STATEMENT OF JURISDICTION.	1
ISSUES FOR REVIEW AND STANDARD OF REVIEW	1
DETERMINATIVE STATUTES	1
NATURE OF THE CASE	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT.	8
ARGUMENT	8
I. Plaintiffs Proved That The Fence Was A Boundary Fence	8
II. The Finding That Both Sides of the Fence Were Owned by Plaintiffs' Predecessor is Incorrect. . . . .	.11
III. Accepting the Twedt Survey as the Correct Boundary Would Spawn Additional Boundary Disputes . . . . .	.12
CONCLUSION . . . . .	.13
ADDENDUM	
A. FINDINGS OF FACT AND CONCLUSIONS OF LAW	
B. 3/7/95- ORAL DECISION OF TRIAL COURT	

TABLE OF AUTHORITIES

Cases cited

Carter vs. Hanrath 885 P.2d 801 (Ct. App. 1994) . . . . .	.8
Ekberg vs. Bates 239 P.2d 205 (Utah 1951)	12
Grayson Roper Ltd. Partnership vs. Finlinson 782 P.2d 467 (Utah 1989) . . . . .	.1
Jensen vs. Bartlett 286 P.2d 804, (Utah 1955)	10
Staker vs. Ainsworth 785 P.2d 418. . . . .	.8
Transamerica Cash Reserve Inc. vs. Dixie Power and Water, Inc. 789 P.2d 24 (Utah 1990) . . . . .	.1

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the District Court for the Fifth Judicial Court of Beaver County. This appeal seeks review of a Judgment entered on May 16, 1995.

This Court has jurisdiction in this case pursuant to Utah Code §78-2-2(3)(j) Utah Code Ann. 1953, as amended.

ISSUES FOR REVIEW AND STANDARD OF REVIEW

(1) Did the Court err in holding that a long existing fence had not become a boundary by acquiescence?

The factual determinations of the trial court will not be disturbed unless clearly erroneous. **Grayson Roper Ltd.Partnership vs. Finlinson** 782 P.2d 467, 470 (Utah 1989).

(2) Did the Court err in holding that Defendants did not commit a trespass on Plaintiff's property?

The trial court's determination as to the applicable law is reviewed for correctness. **Transamerica Cash Reserve Inc. vs. Dixie Power and Water, Inc.** 789 P.2d 24, 25(Utah 1990).

DETERMINATIVE STATUTES

Appellant believes that there are no constitutional provisions, statutes, ordinances, rules or regulations that are determinative.

NATURE OF THE CASE

This is an action for trespass brought by Appellants, ("Parkinson and Larsen") against Appellees ("Rikers"). They claim that Rikers destroyed a long existing fence and irrigation ditch and built a road on property on Parkinson and Larsen's side of the fence which has been in place for more than fifty years; that the fence which approximates the quarter section line, if not the quarter section line, defines a boundary by acquiescence.

Defendants claim that a survey they commissioned establishes that there is a deeded right-of-way on the disputed land for their use. They counterclaimed, seeking to quiet title to the disputed property in their favor. The trial court dismissed the Plaintiffs' trespass action finding there was no evidence the fence was a boundary fence and that Defendants had built the road on a deeded right-of-way. The court made no ruling on Defendants' counterclaim for quiet title. Parkinson and Larsen appealed from the dismissal of their complaint.

STATEMENT OF FACTS

Rikers purchased a twenty acre parcel from Myrl P. Lessing ("Lessing") by warranty deed recorded July 28, 1989. (R., p. 157, Exhibit 39). The parcel is located east of an old fence which runs north and south generally along the quarter section line. It is described in the deed as follows:

The South half of the Northeast(sic) quarter, of the Northwest quarter of Section 10, Township 29 South, Range 7 West, Salt lake Base and Meridian.

Parkinson and Larsen, as well as others who were not parties to this action, own parcels which are west of the fence.

Lessing had acquired title to the parcel by a Partition Order issued by the Fifth Judicial District Court for Beaver County entered August 8, 1987, and recorded September 25, 1987. (R., p. 157, Exhibit D-15). The grant to Lessing in the Partition Order included a right-of-way for access across two other parcels created by the Partition Order which lie east of Lessing's parcel. (R., p. 157, Exhibit D-15, paragraph e.)

The deed from Lessing to Rikers (Exhibit 39) included the right-of-way which was granted to Lessing by the Court order. It is described in the deed as follows:

"TOGETHER WITH a 30 foot right-of-way conveyed to the grantor herein from the Southeast corner of the above described property, running Easterly to the County Road."

The deed also described a right-of-way which approached the property from the south. The right-of-way is described as follows:

"Beginning 80 rods East of the West 1/4 corner of Section 10, Township 29 South, Range 7 West, Salt Lake Base and Meridian; thence North 120 rods; thence east 30 feet; thence South 120 rods; thence West 30 feet to beginning."

Rikers, residents of California at the time of the purchase, were nonetheless familiar with the property. Defendant, Jesse Riker, testified that he was a general contractor in California and that in 1980 he designed and helped build a house for Ronnie Anderson on property which adjoined the Lessing property to the north. At that time he walked the Lessing property. Every time he came to Utah he looked at the property and tried to find out if

he could buy it "because it was tied up in court with the death." He testified that he was concerned with the "pretty corner" with "all those oak trees" where he now has his house; that he didn't care about the rest of the property. (Trial transcript, 3/7/95, pp.109-113).

Jesse Riker also testified that when he had been at the property he had observed the fence in question; that the fence had no bearing on the purchase or use he intended to make of the Lessing property. (Trial transcript, 3/7/95, pp. 117-118). Further, that Rikers used an east/west access to their residence until the property was subdivided in 1990. A parcel was sold to a buyer from California who closed off Rikers' access. (Trial transcript, 3/7/95, pp. 130-131). Jesse Riker told Hazel Larsen that he then "had no way of getting to [his] home." (Trial transcript, 3/7/95, p. 128), The deed Rikers received from Lessing still provided the east/west right-of-way directly to a county road which was granted in the Partition Order. (Exhibit D-39).

Mike Dalton, a title officer testified for the Rikers as to documents he had retrieved from the Office of the Beaver County Recorder. He concluded from his examination that Arnold Parkinson, father of Foch Parkinson, had acquired ownership of the property east of the fence in 1919 and 1928 referring to Exhibit D-26 and Exhibit D-27. He also identified Exhibit D-28, indicating that it was a certified copy of a deed which involved property which was included in the partition action , but was not involved

in the suit. However, he failed to refer to another deed on the same exhibit; that deed is in the direct chain of title to the property now owned by plaintiffs (and a portion of the property now owned by the other Californian who cut off Rikers' access). That deed, dated March 29, 1944, and recorded November 29, 1950, describes the east line of the property conveyed as "**the fence**" and the south boundary as "**the north side of the county road**". (R., p.157, Exhibit D-28). The fence is the one in question in this action. The county road is the one shown as the south boundary of Plaintiff Larsen's parcel.

Plaintiff Hazel Larsen testified that she owned a farm and an upholstery shop. She testified as to her direct knowledge of the fence as follows:

"...what we have always known for all our life as the **boundary line going up this old fence line** here...north and south." (Trial transcript, 6/21/94 pp. 22-23, emphasis added.)

She further testified that there was an old right-of-way to Rikers property which was on the east side of the fence through an existing gate. (Id, pp.24-29). She identified exhibit P-3 stating:

A. It shows the old fence line -- the old road on the east side of what we thought was the boundary fence.

Q. Does it show the fence?

A. Yes it does.

She described the property the plaintiffs lost by Rikers building the new road west of the torn down fence as 71 feet wide

on one end and approximately 30 feet on the other end. (Id, pp. 34).

Plaintiff Foch Parkinson testified that he was 76, a farmer and owned a truck wash; that he formerly was in the dairy business and a trader of horses and cattle; that he could remember the property since when he was a child. (Id., pp. 57-58).

He further testified that the right-of-way through the gate east of the old fence had been there all of his life. That he had used it as had "all the people that had an interest in the Johnny Smith ditch..." (Id., pp. 62-65). When asked how his property was separated from other owners he replied, "Well, they've got fences between us." (Id, p. 61).

James Parkinson testified for the plaintiffs that he was 40 years old and that he had been on the property most of his life. With respect to the fence he testified that:

"...the property that I acquired used to belong to the Limbs. It was a--a **property line between them and my grandfather. It was a boundary line.**" (Trial transcript, 3/7/95 p. 15, emphasis added). He further testified that after the partition order the fence was recognized as a boundary line. His testimony, referring to the grantees in the Partition Order was:

Q. ...Now, what purpose did the fence serve among those parties?

A. It was a boundary line from -- when they broke up the estate, **everybody got from that fence** -- some got some on the west side of it, and some got some on the east side of it....

Q. You say that it was a boundary line when they broke up the estate, is that right?

A. Yes.

Q. All right. What was it before that?

A. Well, **it was a boundary line**. Because my father did not own this property. He acquired it later...**It was a boundary line**.

Q. During the period of time that you were acquainted with the property and the fence, did you know of any use that was made of it?

A. **It was a property line** and to keep other animals off this guy's property.

THE COURT: Which guy?

THE WITNESS: The guy that owned this years ago. (Trial transcript, 3/7/95, p. 17-18, emphasis added).

James Parkinson then identified Exhibit P-21, a photograph which he testified: "It shows a -- a picture of the old fence and the old wooden gate we used to go through on the east side of the old fence." He further testified that the photograph showed the fence which he had already described as the boundary line and a roadway. With respect to the roadway he testified:

Q. All right. Now, P-21 -- what do you know about the roadway depicted in P-21?

A. That's the -- the access road getting into these other properties.

Q. All right. And who put that in?

A. I have no idea. It's been there all my life. (Id, pp. 25-27).

SUMMARY OF ARGUMENT

In determining whether there was a boundary by acquiescence the court should have (1) considered the testimony of Plaintiffs' three witnesses to the effect that a long existing fence was recognized as a boundary; (2) considered a 1944 deed to Plaintiffs' predecessor in title that used the fence in describing the east boundary of the property conveyed.

Public policy favors the determination of boundaries based upon historic, peaceable usage instead of by a survey which prorates distances and creates a detached strip of land which adversely affects other property owners not involved in this action.

ARGUMENT

I. PLAINTIFFS PROVED THAT THE FENCE WAS A BOUNDARY.

Defendants produced no evidence to refute the testimony of the plaintiffs' witnesses that the fence that Defendants tore down was a boundary fence. As shown above, the record contains the testimony of three witnesses who had grown up on the property that the fence was a boundary between the neighbors on either side.

There is a four pronged test to determine a boundary by acquiescence. The elements of boundary by acquiescence are:

(1) occupation up to a visible line marked by monuments, fences or buildings; (2) mutual acquiescence to the line as a boundary; (3) for a long period of time, generally not less than 20 years; (4) by adjoining landowners. **Carter v. Hanrath**, 885 P. 2d 801 (Ct. App. 1994) citing from **Staker v. Ainsworth**, 785 P.2d 417, 420.

The trial court found that the first element had been established. The court, however, found that plaintiffs had failed to prove the second element- "mutual acquiescence to the line as a boundary". The court addressed this element as follows:

"There must be mutual acquiescence in the fence in this case as a boundary. That has not -- not been proven by the plaintiff. **I have no evidence whatsoever as to who put in the fence or for what purpose. I don't even know when it was put in.**" (Trial transcript, 3/7/95, p. 140 emphasis added.)

The court did not comment on the third element, the length of time, but did comment on the fourth-"by adjoining land owners."

The court stated:

"the evidence I do have shows that the same person owned both sides of the fence as early as 1925, as I recall." (The court corrected the date, after comment by the defendant's counsel, to 1928.)

The court continued,

"Obviously there can't be a boundary by acquiescence where a fence runs through property owned on both sides by the same owner. You can't agree by yourself to make this a boundary across your own property. That's nonsensical. Besides which, the fourth element of boundary by acquiescence is that it has to be a boundary between adjoining property owners. And those have to be different property owners. So there has been **no evidence that the fence was ever intended as a boundary by whoever put it in. And we don't know who that was.** (Id, p. 141).

Finally, the court concluded:

"Now the question becomes did anybody in the intervening years from the time it was put in until now mutually agree that that was going to be the boundary of the property. I have **no evidence that that's ever taken place.** We've had lots of people own property along that fence on both sides, but I have **no evidence that anybody ever agreed that was going to be a boundary line.** The fence has just sat there, and people have bought and taken title to property in accordance with the general legal descriptions that are laid out by survey. **No evidence has been presented that would indicate that anybody ever agreed that that fence line was going to be the boundary between these two pieces of property at any point**

versus the -- the survey line." (Id., p.141 emphasis added).

The trial court placed too great a burden of proof on the plaintiffs. Earlier decisions of this Court make it clear that the party claiming a boundary by acquiescence does not have to prove when a long standing fence or other monument was erected or by whom. Because there are often no living witnesses to construction or usage of long existing fences and the like, this Court held in **Jensen v. Bartlett**, 286 P.2d 804, (Utah 1955) that:

"It is well recognized by this court that where the parties have acquiesced in a fence as marking the boundary line for a long period of time, it is immaterial whether there was an express agreement to that effect or not. Under such proof the court will indulge a fiction, or hold there is a presumption that such an agreement existed." (citations omitted).

As discussed above, the deed from Lessing to the Rikers contained two separate right-of-way descriptions. One which the court order established in the partition action and a second one which accessed the property from the south on the dividing line between Plaintiffs and neighbors to the west. Defendants hired a surveyor, Marcus A. Twedt, to locate the second right-of-way.

The survey done by Twedt was marked Exhibit D-1 and was received into evidence. The survey map, copy of which here follows on page 11-A, contains the following under "Narrative":

"PRIMARY PURPOSE OF THIS SURVEY IS TO DETERMINE THE LOCATION OF THE 30' DEEDED RIGHT-OF-WAY. ALL BUT TWO SECTION CORNERS LOCATED BY PRO-RATING DISTANCE FROM CORNER SECTIONS..."

Plaintiffs' witness, James Parkinson testified that he had found a BLM marker which was 18 feet from the one set by Twedt. He also testified that by measuring from the BLM marker the

distance "comes out right -- real close to that old gate. Within a few feet. (Referring to the gate which he had identified in Exhibits P-7 and P-21.)(Trial transcript, 3/7/95, p. 43) Reproductions of Exhibits P-21 which shows the gate, P-3, which depicts the old road as it continues northward from the gate and Exhibit P-13, which shows the road which Rikers built west of the fence and old road, are shown on page 11-B here following.

II. THE FINDING THAT BOTH SIDES OF THE FENCE WERE OWNED BY PLAINTIFFS' PREDECESSOR IN TITLE IS INCORRECT.

The trial court relied on the testimony of defendant's witness, Michael Dalton, to conclude that the property now owned by plaintiffs was acquired by Arnold Parkinson between 1919 and 1928; that he also owned property on the west side of the old fence at the same time. Dalton, however, neglected to take into consideration a later deed in which Arnold Parkinson was the grantee; a deed which referred to the old fence as the east boundary of the property now owned by plaintiffs and others. (Exhibit D-28). Although the chain of title in the record is not complete, it is clear that sometime between 1928 and 1944 Arnold Parkinson sold (or perhaps during the depression years lost) the property now owned by plaintiffs. Later, in 1944, he reacquired the property by a deed which clearly recognized the fence as the east boundary of the property conveyed. Accordingly, the court's findings that "...there can't be a boundary by acquiescence where a fence runs through property owned on both sides by the same owner" and "no evidence has been presented that would indicate that anybody ever agreed that the fence line was going to be the

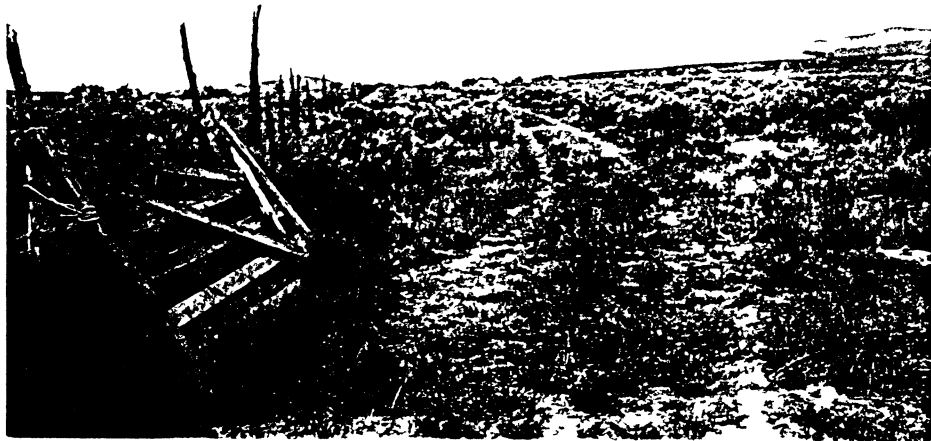


EXHIBIT P-21

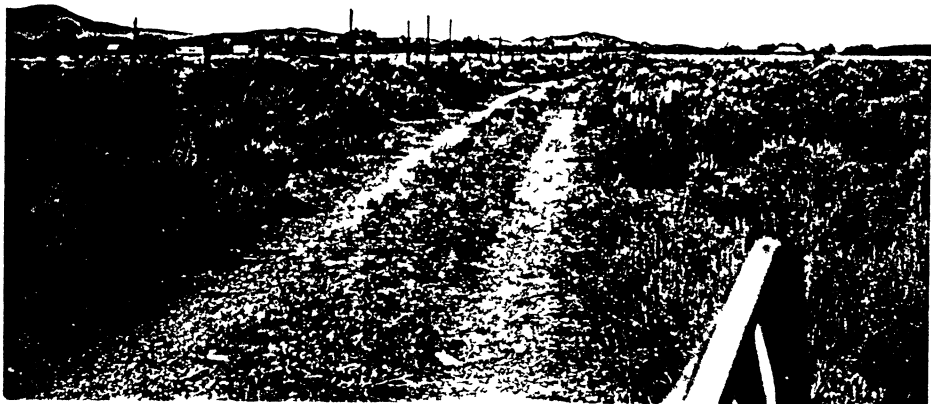


EXHIBIT P-3



EXHIBIT P-13

boundary between these two pieces of property at any point versus the -- survey line" (Trial transcript, 3/7/95, p.141) are clearly incorrect when the 1944 deed is taken into consideration.

III. ACCEPTING THE TWEDT SURVEY AS THE CORRECT BOUNDARY WOULD SPAWN ADDITIONAL BOUNDARY DISPUTES.

As noted above the Twedt survey was done for the purpose of locating the right-of-way and not for establishing the boundary. Twedt noted on the map (Exhibit D-1) that only two section corners were located; that the other corners were established by proration. Twedt's establishing the boundaries by proration rather than reliance on the metes and bounds descriptions and references to monuments, such as in the 1944 deed which used the fence and the county road as boundary lines (Exhibit D-28), causes an unacceptable side effect. His survey results in the acquisition by plaintiffs, and all the rest of the property owners west of the old fence, of a thin strip of land on the west side of "Old Highway 91". It would be disturbing news to the owners on the west side of the highway that they have no highway frontage. If plaintiffs or the other property owners were to assert ownership to the windfall highway frontage more litigation would be the result. Where does it end? At the Utah-Nevada border?

The Utah Supreme Court has recognized that the "doctrine of boundary by acquiescence rests on sound public policy of avoiding trouble and litigation over boundaries." **Ekberg v. Bates**, 239 P.2d 205 (Utah 1951).

Here, the Rikers who came to Utah in 1989 to build a house in

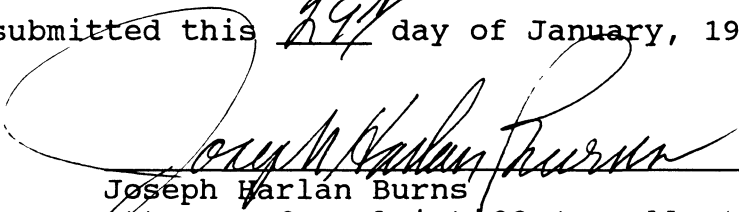
the "pretty corner" and who didn't care about the rest of the property (Trial transcript, 3/7/95, pp. 109-113) have knocked down a fence and bulldozed an irrigation ditch rather than improve an existing road which neighbors for years have recognized and used peaceably.

Some people travel west to Utah, admire its beauty and say it should be wilderness; untouched by man. Others move east to Utah to escape congested, crime-infested coastal cities. Too many come to Utah with little regard for the rights of farmers, ranchers, and other descendants of pioneers who have lived peaceably as neighbors for generations.

CONCLUSION

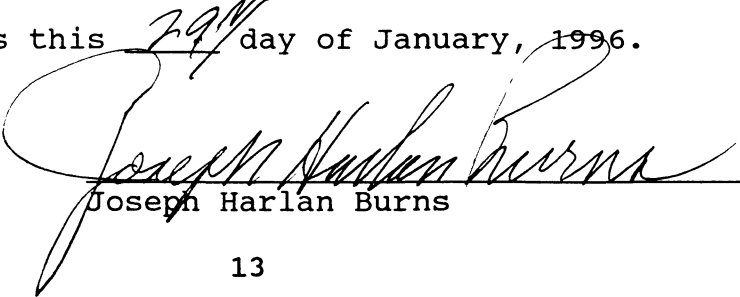
The trial court erred when it failed to establish a boundary by acquiescence. This Court should remand this case to the trial court with instructions to enter judgment in favor of plaintiffs establishing the old fence as a boundary.

Respectfully submitted this 29th day of January, 1996.


Joseph Harlan Burns
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Appellants were hand delivered to J. Brian Jackson, Attorney for Defendants/Appellees this 29th day of January, 1996.


Joseph Harlan Burns

A D D E N D U M

the Court having received evidence, heard testimony or witnesses, argument of counsel, and having reviewed the file and good cause appearing the Court now enters the following:

FINDINGS OF FACT

1. That jurisdiction and venue are proper.
2. That Plaintiffs' claim is not procluded by the Doctrine of Res Judicate.
3. That Plaintiff's claim is not procluded by the Doctrine of Colleteral Estoppel.
4. That Plaintiffs' claims for Trespass, Boundry by Acquiescence and Damages together with all other claims asserted in Plaintiffs' Complaint are dismissed, the Plaintiffs having failed to prove Boundry by Acquiescence, Trespass or Damages resulting from Defendants' improvement and upgrade of an existing lane along and within the deeded right of way to Defendants' property.

From the above Findings of Fact this Court now concludes:

CONCLUSIONS OF LAW

1. The Doctrine of Res Judicate does not proclude Plaintiffs' claims as a matter of law.
2. The Doctrine of Colleteral Estoppel does not proclude Plaintiffs' claims as a matter of law.
3. Plaintiffs' claims for Trespass, Boundry by Acquiescence and Damages, together with all other claims asserted in Plaintiffs' Complaint, are dismissed with prejudice and on the merits as against these Defendants, the Plaintiffs having failed to establish Boundry by Acquiescence, Trespass, or Damages resulting from Defendants' improvement of an existing lane within and along the deeded right of way to Defendants' property.

WITNESS my hand and the seal of this Court this _____ day of

1 THE COURT: All right. Obviously there can be
2 no trespass if, in fact, Mr. Riker was privileged by the
3 exercise of an easement which he had acquired to traverse
4 the property that he traversed in putting in his road.
5 He's entitled to remove obstructions from that right-of-way
6 if he has a right-of-way that he can use.

7 The question then becomes whether or not the
8 right to use that property is controlled by deeds and
9 surveys, or whether it's controlled by the doctrine of
10 boundary by acquiescence.

11 Boundary by acquiescence has specific elements
12 which must be established. There must be occupation up to
13 a visible line marked by monuments, fences or buildings.
14 Obviously that's been established. Mr. Parkinson and
15 others have testified that the property on both sides of
16 the fence -- fence was fully occupied.

17 There must be mutual acquiescence in the fence
18 in this case as a boundary. That has been -- not been
19 proven by the plaintiff. I have no evidence whatsoever as
20 to who put in the fence or for what purpose. I don't even
21 know when it was put in. The evidence I do have shows that
22 this same person owned both sides of at least the bottom
23 portion of that fence as early as 1925, as I recall. But
24 let me look.

25 MR. JACKSON: 28, Your Honor.

1 THE COURT: 28. 1928.

2 Obviously there can't be a boundary by
3 acquiescence where a fence runs through property owned on
4 both sides by the same owner. You can't agree by yourself
5 to make this a boundary across your own property. That's
6 nonsensical. Besides which, the fourth element of boundary
7 by acquiescence is that it has to be a boundary between
8 adjoining property owners. And those have to be different
9 property owners. So there has been no evidence that the
10 fence was ever intended as a boundary by whoever put it
11 in. And we don't know who that was.

12 Now the question becomes did anybody in the
13 intervening years from the time it was put in until now
14 mutually agree that that was going to be the boundary of
15 the property. I have no evidence that that's ever taken
16 place. We've had lots of people own property along that
17 fence on both sides, but I have no evidence that anybody
18 ever agreed that was going to be a boundary line. The
19 fence has just sat there, and people have bought and taken
20 title to property in accordance with the general legal
21 descriptions that are laid out by survey. No evidence has
22 been presented that would indicate that anybody ever agreed
23 that that fence line was going to be the boundary between
24 these two pieces of property at any point versus the -- the
25 survey line.

1 So I find that the plaintiff has failed to
2 establish boundary by acquiescence.

3 I granted the Motion -- or I denied the Motion
4 to Dismiss after the plaintiffs' case, as I said, because I
5 wanted to give the -- the benefit of the doubt to the
6 plaintiff and give the defendant an opportunity to present
7 their evidence. But the defendants' evidence as presented
8 by Mr. Dalton clearly indicates that Arnold Parkinson owned
9 this property way back. And whether he built the fence, I
10 don't know. But that's as far back as the evidence goes.
11 And at that time, the fence, if it was there, ran through
12 his property, not adjoining -- not across adjoining -- or
13 between adjoining pieces.

14 Given that, the question -- I -- the question is
15 is the fence -- may Mr. Riker remove the fence? The survey
16 shows that the fence was on his property. And it's his
17 fence. He can do what he wants with it. In addition, he
18 had a right to an easement which was deeded to him properly
19 and which is of record.

20 So I'm going to find in favor of the defendants
21 and against the plaintiffs and find that the plaintiffs
22 have no cause of action, they having failed in their proof.

23 MR. JACKSON: Thank you, Your Honor.

24 MR. BURNS: Your Honor, may we have findings of
25 fact and conclusions of law?